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NOTE AND COMMENT

BOYCOTT—CLAYTON ACT.—In *Duplex Printing Press Company v. Deering et al.* (January 3, 1921), 41 S. Ct. 172, the facts were:

The plaintiff, a Michigan corporation, manufactures at Battle Creek, and sells throughout the United States, especially in and around New York City, and abroad, very large, heavy and complicated newspaper printing presses. Purchasers furnish workmen, but ordinary mechanics alone are not competent to do this, and so they are supervised by specially skilled machinists furnished by plaintiffs. The plaintiffs have always operated on the "open shop" plan, without discrimination against union or non-union labor, either at its factory or at the place of installation of presses, but have not observed the eight-hour day nor the union scale of wages.

Defendants are members of the International Association of Machinists, and are sued individually and in various representative capacities. This association is unincorporated, with a membership of over sixty thousand in various districts and local unions throughout the United States. D and B are sued individually and as representatives of unincorporated District No. 15, composed of six local lodges of the association in New York City. N is

sued individually and as agent of unincorporated local lodge 328, of this district. Another N is sued individually and as agent of the unincorporated Riggers' Protective Union of workingmen engaged in handling, hauling and erecting machinery, with jurisdiction over all union men in that business in New York City.

It was also alleged that both the union machinists and union riggers were so affiliated with the Building Trades Council of New York City, including thirty different trades and over seventy-five thousand members, no one of which was allowed to work in or on a building where a non-union man was employed; that it was practically impossible to erect any building in New York where any non-union man was employed; that the whole machinery of the council would be put in operation to prevent plaintiff from exhibiting its presses at a pending exposition; that the Association of Machinists and its branches were combining and conspiring to monopolize the machinist's trade throughout the United States, and prevent the employment of any machinist who was not a member by any employer unless he would operate a closed shop and employ only machinists who were members of the union.

No one of the defendants is, or ever was, an employee of the plaintiff, nor a member or representative of any lodge or union not local to New York City.

The suit was to enjoin an alleged conspiracy by the defendants to restrain plaintiff's interstate commerce in printing presses, contrary to the common law and to the Sherman Anti-trust Act. It was begun before, but not heard until two years after, the Clayton Act was passed, the provisions of which were invoked by both parties.

Between 1909 and 1913 all of plaintiff's competitors had recognized and dealt with the Machinists' Union and conformed to its requests, but the plaintiff steadfastly refused. In 1913 two of these competitors notified the Union they should be obliged to terminate their agreements with it unless the plaintiff would accede to the union requirements. Because plaintiff refused to do this, eight months before suit was brought, the International Association of Machinists, with a view to compelling plaintiff to unionize its factory, enforce the "closed shop," adopt the eight-hour day and the union scale of wages, called a strike at plaintiff's factory. Only fourteen union machinists, including three who supervised the erection of presses by plaintiff's customers, left. This did not materially interfere with plaintiff's business and is not complained of in the suit.

The acts complained of relate solely to the interference with the installation and operation of presses by plaintiff's customers, by an elaborate, country-wide programme, adopted and carried out by the defendants and their organizations, to boycott plaintiff's products; by warning *customers* not to purchase, or, if purchased, not to install presses; by threatening them, if they did, with loss by strikes of their employees and sympathetic strikes in other trades; by notifying a *trucking company* not to haul presses, and threatening to incite their employees to strike if they did; by notifying

repair shops not to repair presses made by plaintiffs; by threatening *union men* with loss of union cards and being blacklisted as "scabs" if they helped install presses; by threatening an *exposition company* with a strike if it permitted plaintiff's presses to be exhibited; and, generally, by injuring and threatening to injure in various ways plaintiff's customers and prospective customers, and persons handling, hauling or installing the presses.

A typical illustration of the acts complained of is: The *Italian Herald* purchased a press; defendant D got to the *Herald* office before the press did; he told the *Herald* it had no right to purchase the press, and "we will make trouble as soon as it arrives"; this was made as promised; the trucking company was told to handle no more after that was delivered, and it stopped; the owner of the building, then under construction, was told the union workmen on the building would be called off on a strike, and the completion of the building would be delayed, if the installation of the press by the *Herald* was not stopped. This was done until Saturday afternoon, night, and Sunday, when installation was completed while the union workmen were not at work on the building. Another illustration: Plaintiff sold a press to N in New York City. Y, a member of the Machinists' Union, was to supervise its installation; defendant D asked Y if he sided with the union or with the plaintiff; he replied he sided with the plaintiff, whereupon D said he would take his union card away from him and blacklist him as a "scab" all over the East. D then followed Y down to the office of the trucking company, where he told the truckman not to haul the machinery; it would make trouble for him if he did; the truckman accordingly refused. No actual violence was used or threatened, although some occurred which was not definitely connected with the defendants.

Manton, J., in the district court, after reviewing the testimony, says: "A careful reading of the entire record leads to the conclusion that if men have a right to strike and to endeavor to prevail upon others to fail to work for their employer, this is such a case as exemplifies careful, prudent, and lawful conduct on the part of employees. There is nothing in this record which warrants my granting the injunction."

On the other hand, Rogers, J., in the Circuit Court of Appeals, said the union men had been coerced by threats of taking away their cards and blacklisting them as "scabs"; customers have been intimidated by threats to call out men engaged in other trades or on uncompleted buildings; presses were not to be repaired, and threats to put them out of order were made; in one case defendants tried to obtain the cancellation of one of plaintiff's contracts.

These are fair illustrations of the different views persons—judges as well as others—take of the same facts in labor controversies. Some think the acts commendable; others think them criminal. See especially the variety of the views taken by the judges in the case of *Allen v. Flood*.¹

Judge Manton of the district court held that under the common law of

¹ *Allen v. Flood*, [1898] A. C. 1; 1 MICH. LAW REV. p. 28. Also, DICEY: COMBINATION LAWS AS ILLUSTRATING THE RELATION BETWEEN LAW AND OPINION IN ENGLAND DURING THE NINETEENTH CENTURY, 17 HARV. LAW REV. 511, 532.

New York, where the suit was brought, the secondary boycott was lawful if not accompanied by malice, violence, or fraud,² and that there was no irreparable injury to any property right permitting an injunction under the Clayton Act.³

Hough, C. J., and Hand, D. J., in the Circuit Court of Appeals, held the acts were lawful under the Clayton Act; but Rogers, C. J., dissented. Hough and Rogers, C. JJ., held that by the common law of New York a secondary boycott was valid under the decisions referred to; but Rogers, C. J., claimed these only applied to a general boycott of all non-union mills and non-union-made materials, and not to a general boycott of a particular manufacturer for maintaining a closed shop, when others doing the same in the same industry were not so molested. Such was a malicious destruction of the good will of business of such manufacturers, and was not lawful in New York; and by the weight of authority elsewhere the boycott is unlawful.⁴ Hough and Rogers, C. JJ., both were certain that the defendants "have agreed to do and attempted performance of the very thing pronounced unlawful under the Sherman Act by the Supreme Court before the Clayton Act."⁵

Manton, J., quoting from a former opinion of Hough, C. J.,⁶ says: "I do not see any distinction which should make a legal difference between a lockout, a strike, and a boycott; all are voluntary abstentions from acts which normal persons usually perform for mutual benefits; in all, the reason for abstention is a determination to conquer by proving the endurance of the attack will outlast the resistance of the defense. For all, the New York law provides the same test: (1) Is the object legal? (2) Are the means used lawful?"

Rogers, C. J., however, says:⁷ "A strike and a boycott are two quite distinct matters. A strike is an effort on the part of employees to obtain higher wages, or shorter hours, or a closed shop by stopping work at a preconceived time. It is an attack made by employees upon their employer, by labor upon capital. But a boycott made by union labor against a product manufactured by non-union labor is an attack upon both labor and capital. It is the union employees on one side and non-union employees and the open shop employer on the other. The principles applicable to a boycott are not applicable to a strike. The strike in Battle Creek may be lawful, while the boycott of the product in New York may be unlawful. The use of the boycott is very generally held to be the use of unlawful means, and it is not material, where

² *Bossert v. Dhuy* (1917), 221 N. Y. 342; *Gill & Co. v. Doerr* (D. C.), 214 Fed. 111.

³ Oct. 15, 1914, C. 323, § 20, 38 St. L. 738; *Comp. St.* 1916, § 1243d.

⁴ Citing *State v. Stockford* (1904), 77 Conn. 227; *Purvis v. United Brotherhood of Carpenters* (1906), 214 Pa. 348; *State v. Stewart* (1887), 59 Vt. 273; *Wilson v. Henry* (1908), 232 Ill. 389; *Beck v. Railway & Union* (1898), 118 Mich. 497; *Quinn v. Leathem*, [1901] A. C. 495.

⁵ *Loewe v. Lawlor* (1908), 208 U. S. 274, 28 S. Ct. 301; *Lawlor v. Loewe* (1914), 235 U. S. 522, 35 S. Ct. 170.

⁶ *Gill Engraving Co. v. Doerr* (C. C. 1914), 214 Fed. 111.

⁷ 252 Fed. 733.

it is resorted to, whether the end sought—in this case the unionizing of the shops in Michigan—is lawful or not.”

These statements are also typical of the difference among judges as to the legal aspects of labor controversies.

Both the District Court⁸ and the Circuit Court of Appeals⁹ held the Clayton Act forbade an injunction, although, but for that act, one should have been granted. The Supreme Court reversed this, Mr. Justice Pitney delivering the opinion for the majority, Mr. Justice Brandeis delivering a dissenting opinion concurred in by Holmes and Clarke, JJ.

All agreed that the lower courts were right in giving effect to the Clayton Act, but they disagreed as to whether the proper effect was given.

Justice Pitney held that Section 16 of the Clayton Act gave a private relief by injunction for threatened loss by a violation of the anti-trust laws, which a private party did not have before;¹⁰ that, by Section 1 of that act, the Sherman Act was defined as an anti-trust law; that plaintiff's right to manufacture and sell presses in commerce is a property right; that unrestrained access to the channels of interstate commerce is necessary to its success; that the facts showed a widespread combination by defendants to obstruct this, resulting in substantial damage and threatening irreparable loss; that by the Sherman Act every conspiracy in restraint of trade or commerce among the states is illegal; that a conspiracy is a combination to accomplish an unlawful purpose, or a lawful purpose by unlawful means;¹¹ that the substance of the matters complained of constitute a *secondary boycott*—i. e., a combination not merely to refrain, or peaceably to advise or persuade plaintiff's customers to refrain, from dealing with it (“primary boycott”), but to exercise coercive pressure upon such customers, actual or prospective, in order to cause them to withhold or withdraw patronage from plaintiff through fear of loss to themselves if they deal with it; that the distinction between primary and secondary boycott is material in the proper construction of the Clayton Act, but it is only of minor importance whether either is unlawful at common law in determining the right to an injunction under the Sherman Act; that by the decisions under this act peaceable persuasion is as much prohibited as force or threats of force, and is not justified even if the participants have some object beneficial to themselves or their associates.¹²

The majority of the Circuit Court of Appeals held that under Section 20, in conjunction with Section 6 of the Clayton Act, no injunction could be granted. Section 6 provides: “The labor of a human being is not a com-

⁸ Duplex Printing Co. v. Deering (D. C., 1917), 247 Fed. 192.

⁹ Duplex Printing Co. v. Deering (C. C. A., 1918), 252 Fed. 722.

¹⁰ Paine Lumber Co. v. Neal (1917), 244 U. S. 459, 471.

¹¹ Pettibone v. United States (1892), 148 U. S. 197, 203. This is the usual definition ever since *The Tubwomen's Case*, in 1664, cited in *King v. Journeymen Tailors* (1721), 8 Mod. 11,320, and *King v. Starling*, 1 Keb. 650, 655, 675, 1 Sid. 174, pl. 6, 83 Eng. R. 1164, 1167, 3 COL. L. REV. 447 (1903).

¹² *Loewe v. Lawlor* (1908), 208 U. S. 274; *Eastern States Lumber Assn. v. United States* (1914), 234 U. S. 600; *Lawlor v. Loewe* (1915), 235 U. S. 522, 534.

modity or article of commerce. Nothing contained in the anti-trust laws shall be construed to forbid the existence and operation of labor organizations, instituted for the purposes of mutual help * * * or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade under the anti-trust laws."

This only declares that nothing in the anti-trust acts shall be construed to forbid labor organizations or their members from *lawfully* carrying out their *legitimate* objects, and does not authorize any unlawful activity or illegal conspiracy in restraint of trade.

Section 20 provides: "No injunction shall be granted * * * in any case between an employer and employees * * * involving or growing out of a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property or to a property right. * * * And no such injunction shall prohibit any person or persons, singly or in concert, from terminating any relation of employment or from ceasing to perform any work or labor or persuading others by peaceful means so to do; from peacefully persuading any person to work or abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from persuading others by peaceful and lawful means so to do; * * * or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto."

All of the judges, in all the courts, agreed that the acts of the defendants amounted to a secondary boycott, of a coercive but not violent character. The controversy was as to the meaning of the "blindly drawn" provisions of the Clayton Act, and especially of the words "employers," and "employees," and "others," in Section 20. The Circuit Court of Appeals held that "employers" and "employees," as used in Section 20, referred to the *business class*, to which the litigants belonged; and that the union and each of its sixty thousand members, although no one of them had ever been employed by the plaintiffs, having first created a labor disturbance by calling a strike at plaintiff's factory, thereafter had such an interest in the matter as to justify the union in calling strikes of the employees of other employers, between whom there was no dispute, and which employers had no business relations with plaintiff except by purchasing presses in the ordinary course of interstate commerce.

Mr. Justice Pitney says: "We deem this construction altogether inadmissible." The act imposes an extraordinary restriction on the equity powers of courts in the nature of a special privilege to a particular class; it would violate all the ordinary rules of construction to extend the privilege by loose construction beyond those who are proximately and substantially, not merely sympathetically, interested in "a dispute concerning terms or conditions of employment"; Congress had in mind particular disputes, not a class war; labor organizations are not mentioned in Section 20, and to extend a dispute directly affecting a few actual employees to all the members of the

union would so enlarge the meaning as to be inconsistent with Section 6, which limits activity to *lawfully* carrying out the *legitimate* objects thereof; "ceasing to patronize" is limited to pressure on a "party to such dispute," by "peaceful and *lawful*" influence on neutrals, not by threats of strikes of their employees, to compel withdrawal of patronage of plaintiff to induce him to yield.

Justice Pitney in support of this view quoted from the explanatory statements made by the spokesman of the House of Representatives Judiciary Committee, who had charge of the bill when it was under consideration, such being a proper aid in ascertaining the legislative intent,¹³ as to the meaning of Section 20. This was unequivocally to the effect that the section "was carefully prepared with the settled purpose of excluding the secondary boycott; it was the opinion of the committees that it did not legalize it; it was not their purpose to authorize it, and not a member of the committee would vote to do so." By the construction given by the court below, an ordinary labor controversy in a manufacturing establishment justifies a nation-wide blockade of interstate commerce in its products by sympathetic strikes and boycotts against its customers, to the incalculable damage of innocent people remote from, unconnected with, and having no control over the actual dispute, constituting the general public, and having a vital interest in unobstructed commerce, which the anti-trust acts were to protect.

Plaintiff has a clear right to an injunction under the Sherman Act as amended by the Clayton Act, and it is unnecessary to consider what the result would be under the common law or local statutes.

Mr. Justice Brandeis, dissenting, says as to the common law: Defendants' justification is self-interest; they support the strike at the factory by a strike elsewhere against its product, not maliciously but in self-defense; plaintiff's refusal to deal with the union and observe its standards threatened not only the interests of its members at the factory but even more of all the affiliated unions employed by plaintiff's competitors, whose more advanced standards plaintiff was, in reality, attacking; the contest between the plaintiff and the union involves vitally the interest of every person whose coöperation is sought. May not all with a common interest join in refusing to labor on articles whose very production constitutes an attack upon this standard of living and the institution which supports it? Yes, by common law principles, if in fact they have a common interest. At first strikes were held illegal.¹⁴ Later, the obvious self-interest of the laborer in the improvement of his wages, hours and conditions of work constituted a justification.¹⁵ Then some courts held the mutual interest of members of a union, in the union, was *not sufficient self-interest* to justify a strike to force the unionization of the

¹³ *Binns v. U. S.* (1904), 194 U. S. 486, 495; *Pennsylvania R. R. Co. v. International Coal Co.* (1913), 230 U. S. 184, 198; *United States v. Coca Cola Co.* (1916), 241 U. S. 265, 281; *U. S. v. St. Paul Ry. Co.* (1918), 247 U. S. 310, 318.

¹⁴ COMMONS, *HIST. OF LABOR*, Vol. 2, Ch. 5.

¹⁵ *Pickett v. Walsh* (1906), 192 Mass. 572.

shop.¹⁶ Other courts, viewing the same facts differently, held otherwise.¹⁷ Later, when centralization of business brought corresponding centralization in labor organizations, a single employer might, as here, threaten the standards of the whole organization, and then naturally the union would protect itself by refusing to work on his materials wherever found; here again some courts held the intervention of the purchaser broke the direct relation between employer and employee, and a strike against the materials was a strike against the purchaser by unaffected third parties.¹⁸ Other courts, better appreciating the facts of industry, recognized the unity of interest throughout the union, and in refusing to work on such materials the union was only refusing to aid in destroying itself.¹⁹ On the question of fact, I would say, as the lower courts said, the defendants and those from whom they sought coöperation had a common interest, and under the common law of New York the plaintiff had no cause of action.²⁰

The Clayton Act was the result of twenty years' agitation to equalize before the law the position of the employer and employee, as industrial combatants. The chief sources of dissatisfaction were the use of the injunction and the doctrine of "malicious combination"; this made an act otherwise *damnum absque injuria*, as a result of trade competition, actionable as malicious, if done for a purpose the judge considered socially or economically harmful. Great confusion existed among the judges as to what purposes were lawful and what unlawful. By 1914, it was thought Congress, and not the judges, should declare how the inequality and uncertainty of the law should be removed and what damages could be inflicted on an employer in an economic struggle without liability, instead of leaving the judges to determine this according to their own economic and social views. This was the idea presented by the committees reporting the Clayton Act. Certain acts committed in the course of an industrial dispute, and which before were declared unlawful whenever the courts disapproved the ends for which they were performed, were declared not to violate any law of the United States; that is, the opinion of Congress as to the propriety of the purpose was substituted for that of differing judges; that relations between employers and workingmen were competitive; that organized competition was not harmful, and that it justified injuries necessarily inflicted in its course. The minority and majority reports of the house committee indicated such to be the pur-

¹⁶ *Plant v. Woods* (1900), 176 Mass. 492; *Lucke v. Clothing Cutters* (1893), 77 Md. 396; *Erdman v. Mitchell* (1903), 207 Pa. St. 79.

¹⁷ *National Protective Assn. v. Cumming* (1902), 170 N. Y. 315; *Kemp v. Division No. 241* (1912), 255 Ill. 213; *Roddy v. United Mine Workers* (1914), 41 Okla. 621.

¹⁸ *Burnham v. Dowd* (1914), 217 Mass. 351; *Purvis v. United Brotherhood* (1906), 214 Pa. St. 348; *Booth v. Burgess* (1906), 72 N. J. Eq. 181.

¹⁹ *Bossert v. Dhuy* (1917), 221 N. Y. 342; *Cohn & Roth Elect. Co. v. Bricklayers* (1917), 92 Conn. 161; *State v. Van Pelt* (1904), 136 N. C. 633; *Grant Construction Co. v. St. Paul Building Trades* (1917), 136 Minn. 167; *Pierce v. Stablemen's Union* (1909), 156 Cal. 70, 76.

²⁰ *Bossert v. Dhuy* (1917), 221 N. Y. 342; *Auburn Draying Co. v. Wardwell* (1919), 227 N. Y. 1. Compare *Paine Lumber Co. v. Neal* (1917), 244 U. S. 459, 471.

pose. If the act applies to this case, then the acts cannot violate "any law of the United States, and so not the Sherman Act." Congress did not restrict the provisions to employers and workmen *in their employ*. By including "employers and employees," and "persons employed and seeking employment," it showed that it was not merely aiming at a legal relationship between a specific employer and his employees. The contention that this case is not one arising out of a dispute concerning the conditions of work of one of the parties is founded on a misconception of the facts.

Judge Brandeis adds that, because he concluded that both the common law of a state and a statute of the United States declare the right of industrial combatants to push their struggle to the limits of the justification of self-interest, "I do not wish to be understood as attaching any constitutional or moral sanction to the right. * * * Above all rights rises duty to the community. The conditions of industry may be such that those engaged in it cannot continue their struggle without danger to the community. It is not for the judges to determine whether such conditions exist, nor their function to set the limits of permissible contest. This is the function of the legislature."

One can hardly refrain from the remark, from the variety of views of the judges who pronounced opinions in this case, that it is about as easy for courts to determine what justice demands under certain conditions as to determine the meaning of an act of Congress. It would seem that Justice Pitney's quotations from the statements made in the house at the time of the report of the Judiciary Committee are the best evidence of what that committee meant to do and thought it had done, and that was to exclude the secondary boycott from the things declared to be lawful. Soon after the Clayton Act was passed similar acts were passed in several states.²¹ The interpretation of many of these has often accorded with the majority opinion in this case.²²

There is no doubt that there has been the trend and confusion in judicial decisions indicated by Justice Brandeis, and many more cases could be cited. So, too, there is no doubt that the common law of New York is as pointed out by him; and scarcely any doubt that the weight of authority elsewhere is otherwise, as indicated by Judge Rogers. Scarcely any English cases were cited. From the time when John Mewic would not let Matilda's tenants till her land in 1200,²³ and the bailiffs of Shrewsbury proclaimed no one in the town should sell merchandise to the Abbott of Lilleshull in 1225,²⁴ to *Quinn v. Leatham*²⁵ and *Pratt v. Medical Association*,²⁶ boycotting has been unlawful in the English law, although it did not get its name until about 1880, when Captain Boycott, representing Lord Earne, in Connemara, Ireland, gave notice to the lord's tenants to vacate, whereupon the people for miles around

²¹ See 20 COL. L. REV. (June, 1920), p. 696.

²² *Ibid.*, p. 697.

²³ SELECT CIVIL PLEAS, Vol. 1, p. 3, pl. 7, 3 Selden Society.

²⁴ SELECT PLEAS OF THE CROWN, Vol. 1, p. 115, p. 178, 1 Selden Society.

²⁵ [1901] A. C. 495.

²⁶ [1919] 1 K. B. 244, 18 MICH. L. REV. 148 (Dec., 1919).

resolved to have nothing to do with him, nor allow anyone else to; so his laborers fled, he got no food, and no one would speak to him, until the Ulsterites came to his rescue, and civil war followed, which the government had to put down by the soldiers.²⁷ There is also no doubt that, under the Sherman Act and the decisions of the Supreme Court before the Clayton Act, the defendants' acts were illegal.

H. L. W.

DISQUALIFICATION OF JUDGES BY PREJUDICE.—Under the provisions of Section 21 of the Federal Judicial Code, Victor Berger and others, who had been indicted under the Espionage Act in the Northern District of Illinois, filed an affidavit charging Judge Landis with personal bias and prejudice against them as German-Americans, and moved for the assignment of another judge to preside at their trial. The motion was overruled by Judge Landis, and he himself presided at the trial, and the defendants were convicted and sentenced. The Supreme Court of the United States, to which the matter came on certificate, held, three justices dissenting, that Judge Landis could not, under the statute, pass upon the truth of the facts alleged in the affidavit showing prejudice, but that, upon the filing of an affidavit sufficient on its face, he was incapacitated from further proceeding with the case. *Berger v. United States*, No. 460, decided January 31, 1921.

This decision seems in harmony with the evident purpose of the statute, and is reassuring to all who feel that the courts cannot too strictly guard themselves from any suspicion of hostility or favoritism toward litigants. The common law was probably too indifferent on this matter. Blackstone says that "in the times of Bracton and Fleta, a judge might be refused for good cause; but now the law is otherwise, and it is held that judges and justices cannot be challenged." 3 COMMENTARIES, 362. But the obviously just rule that a man cannot be judge in his own case, now universally recognized, would seem to extend itself in principle over every suit where a judge, by reason of prejudice and the consequent partisan interest which he develops, has made himself morally a party to the action. The section of the Federal Judicial Code on which the objection to Judge Landis was based undertook to put this principle into operation. Upon the filing of the affidavit Judge Landis undoubtedly became a party to a controversy over his own fitness, and he insisted on deciding the merits of the case in which he was a contestant. The Supreme Court thought him qualified to decide the legal sufficiency of the showing made, but not to pass upon the truth of the accusation.

Under a somewhat similar statute in Montana it has been held that the filing of a proper disqualification affidavit *ipso facto* deprives the judge of further authority to act. *State ex rel. v. Clancy*, 30 Mont. 529; *State ex rel. v. Donlan*, 32 Mont. 256. Under the California statute a similar result follows in justice court cases, *People v. Flagley*, 22 Cal. 34, and in superior court cases where no counter affidavits are filed, *People v. Compton*, 123 Cal.

²⁷ LAW AS TO BOYCOTT, WYMAN (1903), 15 Green Bag, 208-215.